No. 76-720

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

BILLY RAY LEE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on October 1, 1976. A petition for rehearing was denied on October 21, 1976 (App. C, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2518(1)(b)(iv) requires the identification in a telephone interception application of every person whom the government has probable cause to believe it will overhear participating in conversations about the illegal activity under investigation.

2. Whether, if the government violated the wire interception statute in this case, suppression of the evidence derived from the intercept is justified.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set out in Appendix D, *infra*.

STATEMENT

After a jury-waived trial in the United States District Court for the Eastern District of Tennessee, respondent was convicted of participating in a gambling business, in violation of 18 U.S.C. 1955 and 2.[1] He was sentenced to two years' imprisonment (all but five months and twenty-nine days of which was suspended) followed by a parole term of three years, and fined $2,500. The court of appeals reversed his conviction,

[1] Respondent was indicted together with Ernest Leon Frizzell, Calvin Howard Henley, Raymond Leon Frizzell, Willard Jesse Marchman, and Frank Rittie Wells. On July 29, 1975, after denial of his suppression motion, respondent waived his right to a trial by jury and submitted his case to United States District Judge Robert Taylor on stipulated facts (C.A. App. 4a, 82a).

finding that he should have been named in the wire interception application and order and concluding that the failure to name him required suppression of his conversations and of evidence obtained in a search conducted pursuant to a warrant based on those conversations (App. A, *infra*, p. 4A). The court found the remaining evidence insufficient to support the conviction.

1. On October 30, 1974, Judge Frank Wilson of the United States District Court for the Eastern District of Tennessee issued an order pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. 2510 *et seq.* (C.A. App. 33a–36a).[2] The order authorized the interception of wire communications of Frank Rittie Wells, Calvin Howard Henley, Ernest Leon Frizzell, Willard Jesse Marchman, Raymond Leon Frizzell, and others as yet unknown, over telephones listed to J. C. McKinney in Chattanooga, Tennessee.[3] The interception was authorized for a period of 15 days but was in fact terminated on November 11, 1974. (C.A. App. 65a).

On November 15, 1974, based upon information obtained from the FBI investigation and from intercepted communications, a search warrant was obtained and various items of gambling paraphernalia were seized from respondent's business, "The Sports-

[2] "C.A. App." refers to the appendix in the court of appeals; we are lodging a copy of that document with the Clerk of this Court.

[3] J. C. McKinney is a fictitious name (C.A. App. 15a).

man" in Morristown, Tennessee (App. A, *infra*, p. 1A; C.A. App. 84a, 86a).[4]

2. Prior to trial, the district court held a hearing on respondent's motion to suppress his intercepted conversations on the ground, *inter alia*, that he should have been named in the interception order.[5] The district court ruled that the information about respondent's activities contained in the affidavit in support of the wire interception application did not establish probable cause to believe that respondent had violated federal law. Moreover, the court found, there was no indication in the affidavit that respondent was an active participant in the larger operation instead of simply one of several bookmakers[6] from whom the operation obtained the betting line (C.A. App. 77a–79a).

The court of appeals reversed. It concluded that when the application for the intercept order was filed the government had probable cause to believe that respondent was participating in the Chattanooga gambling operations (App. A, *infra*, pp. 3A–4A). Relying on its decision in *United States* v. *Donovan*, 513 F. 2d 337 (C.A. 6), certiorari granted, 424 U.S. 907 (argued October 13, 1976), it held that since respondent was not named in the application and order, "[t]he district court should therefore have granted [respondent's] motions to suppress the evidence obtained by both the interceptions and the search" (App. A, *infra*, p. 4A).

[4] The stipulated facts revealed that between April 1973, and November 1974, Wells, Henley, the Frizzells, and Marchman were engaged in a bookmaking operation that entailed wagering on various athletic contests. Respondent was a bookmaker who often supplied the operation with "line" information on professional and intercollegiate football games (C.A. App. 84a–86a).

[5] Respondent was identified in the affidavit in support of the wire interception application as a bookmaker who supplied line information to gamblers in East Tennessee, but he was not named in the application or order itself (C.A. App. 28a–29a, 7a, 33–35a).

[6] Two other bookmakers besides respondent were identified in the affidavit, though not in the application or order, as having contacts with the operation (C.A. App. 22a, 29a).

REASONS FOR GRANTING THE WRIT

The questions presented by this case are now before this Court in *United States* v. *Donovan*, No. 75–212, argued October 13, 1976. For the reasons set forth in our brief in *Donovan*, a copy of which we are sending to respondent, we believe that Title III does not require that everyone the government has probable cause to believe it will overhear engaging in conversations concerning the illegal enterprise under investigation must be identified in an application for an interception order. But even if the statute does require such identification, we further argue that suppression of the intercepted conversations is neither authorized by statute nor justified in policy by procedural defects of this nature, particularly in the absence of any showing of government bad faith or prejudice to the defendant from the failure to identify him. Therefore, we believe the court of appeals incorrectly concluded that respondent's intercepted

telephone conversations and the evidence seized at his place of business should have been suppressed.[7]

Whether we are right or wrong in these contentions will be determined by this Court in *Donovan*, and the result of that case will control the disposition of the instant petition. If this Court resolves the identification issue in *Donovan* in the government's

[7] The opinion stated (App. A, *infra*, p. 4A):

"Since the information that was obtained by the interception cannot be employed against [respondent], the government concedes that the evidence seized in the search of [respondent's] premises must also be suppressed because the authorization for the search was based in large part on information derived from the interception. *See Wong Sun* v. *United States*, 371 U.S. 471 (1963)."

This language suggests that the court of appeals may have believed that under *Donovan* a failure to name an individual who should have been identified in the application and order requires suppression against that individual of any evidence derived from the interception. *Donovan* did not so hold, and we would not concede the correctness of any such holding. The sole issue in *Donovan* concerned the admissibility of the intercepted conversations *of the non-identified individuals*. If this Court were to reject our arguments in *Donovan* and affirm the decision of the court of appeals, that would mean that the failure to name an individual who should have been identified requires suppression of that individual's intercepted conversations and any direct evidentiary fruits thereof. That individual would not, however, have standing to obtain suppression of intercepted conversations to which he was not a party, and evidence derived from such conversations could be used against the non-identified individual, contrary to the implication of the above-quoted language of the court of appeals in this case.

Here, however, the reversal of respondent's conviction was based upon evidence related to the interception of his conversations. Accordingly, the language of the court of appeals is dictum insofar as it suggests a broader principle of evidentiary exclusion, and this case affords no occasion to review the correctness of that language.

favor, the decision here cannot stand, and certiorari should be granted in this case and the case remanded to the court of appeals. On the other hand, should the court of appeals' ruling in *Donovan* on the identification issue be sustained, the instant petition for a writ of certiorari should be denied.

CONCLUSION

Consideration of this petition should be deferred pending this Court's decision in *Donovan*, and the petition should be disposed of as appropriate in light of that decision.

Respectfully submitted.

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NOVEMBER 1976.

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APPENDIX A

No. 75–2252

United States Court of Appeals for the Sixth Circuit

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

BILLY RAY LEE, DEFENDANT-APPELLANT

ON APPEAL *from the United States District Court for the Eastern District of Tennessee, Southern Division*

Decided and Filed October 1, 1976

Before: PECK, MCCREE, and ENGEL, *Circuit Judges.*

MCCREE, *Circuit Judge.* Billy Ray Lee appeals from his conviction for violation of 18 U.S.C. §§ 2, 1955, which forbid participation in a gambling business which involves more than five persons, which has revenues in excess of $2,000 in a single day, and which violates the laws of a state (in this case, Tennessee) in which it is conducted. The dispositive issue is whether evidence seized during a search of defendant's premises pursuant to a search warrant should have been suppressed.

The warrant was based in large part upon information obtained by an interception of defendant's telephone communications pursuant to an order of the district court for the Eastern District of Tennessee. The order authorized the interception of calls to and from three telephones used by five named principal gambling investigation suspects who are not parties

to this appeal. It was issued under the authority of 18 U.S.C. § 2518, which provides, *inter alia,* that

> (4) Each order authorizing or approving the interception of any wire or oral communication shall specify—
>
> (a) the identity of the person, if known, whose communications are to be intercepted; . . . .

In *United States* v. *Donovan,* 513 F. 2d 337 (6th Cir. 1975), this court, following *United States* v. *Kahn,* 415 U.S. 143 (1974), ruled that the application and order must name all persons whom the government has probable cause to believe are committing the offense for which the wiretap is sought. Since we conclude that the rationale of *Donovan* requires the suppression of this evidence, we reverse.

The district court recognized the authority of *Donovan,* which was decided three months prior to its order denying the motion to suppress, but sought to distinguish this case on its facts.

In *Donovan,* the interception had been aimed primarily at other defendants, but information gathered from it was used to convict Buzzacco. Before the application for an extension of a prior intercept order in the same investigation, 91 calls had been made in ten weeks from the prime suspects to a telephone in Youngstown listed in a name known to be used as an alias by Buzzacco. Buzzacco had a reputation as a bookmaker from previous investigations, and had moved his place of operations in 1972 to an address in Niles. However, it was not clear from the record whether the FBI's physical surveillance had placed Buzzacco at that address prior to the intercept application. Telephone calls between other suspects and a person at the Niles address' telephone, identified only as "Buzz" or "Buzzer" had been intercepted pursuant to the prior order.

Finally, at the suppression hearing FBI Agent Ault, upon whose affidavits the wiretap orders had been based, testified that at the time of the application he had had "suspicions" that Buzzacco was involved. 513 F.2d at 431–42.

In this appeal, the FBI had received from a reliable confidential source information which was set forth in the affidavit supporting the application for an intercept order, that defendant Lee was a known bookmaker who operated "The Sportsman" in Morristown; that Lee operated in Knoxville a telephone, number 522–3741, for his bookmaking business; and that the informant had personally made use of this number to obtain "line" information for wagering on sporting contests. The affidavit further stated that this information had been corroborated by independent investigation by FBI agents and by contacts with other sources.

Furthermore, Lee had admitted to an FBI agent prior to the application that he was engaged in business as a bookmaker; that he owned the Sportsman, and that he used a telephone there, number 586–6881, for his bookmaking business. Inspection of telephone company records had also revealed "almost daily" calls from the telephones of the primary suspects named in the application and order to both number 522–3741 and number 586–6881.

To the extent that the facts here and in *Donovan* are different, this appeal presents a more compelling case for requiring that the "known" incidental subject of interception be named in the application and order.

In *Donovan,* Chief Judge Phillips, writing for the court, insisted that

> [i]t is apparent that Congress intended § 2518 (1) to impose "stringent conditions," thereby

> playing an integral role in the limitation of wiretap procedures and serving a substantial purpose in the statutory scheme to limit the indiscriminate or otherwise unauthorized use of wiretaps.

513 F. 2d at 340–41. Thus any omission of information required by the statute, "whether the omission was inadvertent or purposeful, . . . cannot be excused as a 'mere technical violation.'"

In *Donovan* we found a violation of § 2518(1)(a) because the identity of a "known" subject of interception had been omitted from the *application* for the intercept order. Here, on the other hand, defendant was mentioned in the affidavit submitted in support of the application, but his name was omitted from the application's list of individuals whose communications were to be intercepted. Consequently, his name also was not listed in the order itself, contrary to the requirements of § 2518(4)(a). This variance is a distinction without a difference. Indeed the government's formal admission of awareness that Lee's communications would regularly be intercepted makes this appeal a stronger case for suppressing the evidence.

Since the information that was obtained by the interception cannot be employed against Lee, the government concedes that the evidence seized in the search of Lee's premises must also be suppressed because the authorization for the search was based in large part on information derived from the interception. *See Wong Sun* v. *United States,* 371 U.S. 471 (1963). The district court should therefore have granted Lee's motions to suppress the evidence obtained by both the interceptions and the search.

If the facts obtained by the unlawful interception and search are stricken from the stipulation, there

is insufficient evidence to support the conviction. This is so notwithstanding the fact that the district court apparently also relied upon defendant's implicit admission of guilt in his motion to suppress as sufficient in itself to show guilt. Since a defendant must attempt to show government knowledge amounting to probable cause to believe that he is committing the offense in order to secure the benefits of the statutory protection, such allegations may not then be used against him on the issue of guilt. Else the protections of § 2518 would be hollow indeed. *Cf. Simmons* v. *United States,* 390 U.S. 377 (1968).

For the foregoing reasons, the judgment of guilty entered against appellant Lee is REVERSED.[1]

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[1] At argument, the court was informed that certiorari was granted in *Donovan* on February 23, 1976. 96 S. Ct. 1100. In the hope that a dispositive ruling might follow promptly, we delayed our decision until this time. However, it is now five months since oral argument in our court, and the Supreme Court has not yet scheduled oral argument. Accordingly, it is likely that it will be several months before the Supreme Court review of *Donovan* is completed. The defendant should not be unjustifiably subjected to the restraints of bail and confinement. Therefore we now decide the appeal under the precedent of our circuit.

APPENDIX B

United States Court of Appeals for the Sixth Circuit
No. 75-2252

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE
v.
BILLY RAY LEE, DEFENDANT-APPELLANT

Before: PECK, McCREE and ENGEL, *Circuit Judges.*

JUDGMENT

APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed.

No costs taxed.

Entered by order of the court.

JOHN P. HEHMAN, *Clerk.*

Filed: October 1, 1976.

APPENDIX C

United States Court of Appeals for the Sixth Circuit
No. 75-2252

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE
BILLY RAY LEE, DEFENDANT-APPELLANT

Before: PECK, McCREE, and ENGEL, *Circuit Judges.*

ORDER

Appellee's pleading captioned Petition for Rehearing" having come on to be heard; and it appearing that the relief requested is that the court ". . . stay the recent decision reversing this case . . ." until the Supreme Court shall have decided the appeal in *United States* v. *Donovan,* 513 F.2d 337 (6th Cir. 1975); and it appearing that the decision of this court was announced October 1, eleven days before receipt of this motion to stay the decision; and it further appearing that appellee can petition for review in the Supreme Court; upon consideration, it is ORDERED that the request be, and it hereby is, DENIED.

Entered by order of the court.

JOHN P. HEHMAN, *Clerk.*

Date: October 21, 1976

APPENDIX D

18 U.S.C. 2510. *Definitions.*

* * * * *

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

18 U.S.C. 2517. *Authorization for disclosure and use of intercepted wire or oral communications.*

* * * * *

(3) Any person who has received, by an means authorized by this chapter, any information concerning a wire or oral communications, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

* * * * *

18 U.S.C. 2518. *Procedure for interception of wire or oral communications.*

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such

application. Each application shall include the following information:

* * * * *

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

* * * * *

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where,

wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

* * * * *

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

* * * * *

(8) * * * (d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)

(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. * * *

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, depart-

ment, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

* * * * *

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